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SUPREME COURT, U.S.

No. 80-1595

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

UNITED STATES OF AMERICA, Petitioner

v.

JOSEPH C. FRADY, Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

AND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, Joseph C. Frady, moves the Court for leave to proceed in forma pauperis. Respondent proceeded in forma pauperis in the courts below. Counsel for Respondent was appointed to represent him under the Criminal Justice Act, 18 U.S.C. §3600A.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT

In this case the Court of Appeals reversed a first degree murder conviction on collateral attack after finding the trial court had given jury instructions on malice unconstitutional under retroactive holdings of this Court. On direct appeal, one judge had held the evidence insufficient to prove premeditation. Frady v. United States, 348 F.2d 84, 95 (D.C. Cir., Wright, J., dissenting.) On collateral attack, the Court of Appeals held the instruction errors required reversal because of the prejudice to Mr. Frady--the evidence of malice, like the evidence of premeditation, was subject to question and Mr. Frady, therefore, had been deprived of a proper jury determination of his culpability.

The government concedes the error in the jury instructions, but claims Mr. Frady's failure to raise the error on direct appeal

should bar habeas relief absent demonstration of "cause" for his procedural default. The government believes the contrary decision of the Court of Appeals ignored the distinction between direct appeal and collateral attack.

REASONS TO DENY THE WRIT

Before discussing the authorities sustaining the Court of Appeals decision, we make three preliminary points.

First, the government's analysis confuses two questions: (1) whether failure to raise the claim on direct appeal bars consideration on habeas, and (2) whether the "cause" requirement of Rule 12, Federal Rules of Criminal Procedure, applies generally to all habeas actions by federal prisoners--even though Rule 12 by its terms does not apply to jury instruction errors, and the Rule 52 "plain error" standard does, as the government concedes[1/] and the Court of Appeals held.

Second, as we show below, the government's erroneous belief the Court of Appeals confused direct appeal and collateral attack stems from the government's failure to discuss authorities addressing the first question above. These cases reveal the distinction clearly, as well as resolve this first question in Respondent's favor.

Third, the government neglects another important point. This case is not a typical federal proceeding under 28 U.S.C. §2255. This is a local, D.C. homicide. It is in federal court solely because it dates from a bygone era in which the U.S. District Court for the District of Columbia tried all local D.C. felonies, and the U.S. Court of Appeals for the District of

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1/ Petition at 13, n.11.

Columbia was, anomalously, the court of last resort on questions of purely local law. In cases such as that here, the federal courts in the D.C. Circuit apply federal procedural rules while determining questions of substantive D.C. law.

Whether Mr. Frady was sufficiently prejudiced by the erroneous jury instructions is a question of substantive law resolved by the Court of Appeals as a remnant of its former plenary authority to decide local issues. The Court of Appeals holding on the question of prejudice is not properly before this Court and deserves the same deference accorded the judgment of the highest court of a state on a question of state law.

We turn to the federal procedural issues raised by the government's petition.

I

Respondent's failure to challenge the unconstitutional jury instructions on direct appeal presents no new question. United States v. Tucker, 404 U.S. 443 (1972), and Kaufman v. United States, 394 U.S. 217 (1968), both undiscussed in the government's petition, control.

Tucker and Kaufman applied two exceptions to Sunal v. Large, 332 U.S. 174 (1947). Sunal held a federal prisoner's failure to raise an issue on direct review precluded collateral attack "where the error does not trench on any constitutional rights" and the case "is not one where the law was changed after the time for appeal had expired." Sunal, supra at 182, 181.

Kaufman applied the first exception, the Court holding, at 223, "that federal habeas relief for constitutional claims asserted by federal prisoners is not limited by" the Sunal rule. (Emphasis in original.) The vitality of this exception is beyond

question. United States v. Addonizio, 442 U.S. 178, 185 (1979); Davis v. United States, 417 U.S. 333, 354 n. 15 (1974).

The second exception was applied in Tucker. There the Court held a federal prisoner could collaterally attack his sentence, imposed in 1953, since the sentencing court had considered state court convictions invalid under Gideon v. Wainwright, 372 U.S. 335 (1963). Tucker's failure to raise the issue on direct appeal was of no consequence, since at the time for that appeal Gideon had not been decided. The Tucker Court held habeas relief warranted, as Gideon was fully retroactive and the error was "of constitutional magnitude." Tucker, supra, at 447.

The Sunal exception applied in Tucker was also recognized in Kaufman, the Court noting that habeas relief is available for constitutional errors not challenged on direct appeal "if new law has been made . . . since the trial and appeal." Kaufman, supra, at 230. This point was again recognized in Davis, supra at 342.

Both of the Sunal exceptions apply here. The challenged jury instructions, first held plain error in cases decided several years after Mr. Frady's direct appeal, were of the kind deemed unconstitutional in Mullaney v. Wilbur, 421 U.S. 684 (1975). Mullaney was held retroactive in Hankerson v. North Carolina, 432 U.S. 233 (1977). In these circumstances, Mr. Frady's failure to challenge the unconstitutional jury instructions on direct appeal is no bar to habeas relief. Furthermore, Kaufman and Tucker reveal that once a claim falls within a Sunal exception, and failure to raise the claim on direct appeal was not a tactical ploy, no additional special restrictions, other than applicable rules of procedure, hamper consideration of the case on its merits.

II

The government, however, urges a change in the law and, by

spurious analogy to Davis v. United States, 411 U.S. 233 (1973), asks the Court to hold Respondent required to show "cause" for his failure to raise the constitutional error on direct appeal.

Such a change in the law, however, would defy logic. The Davis "cause" requirement comes from the express language of Rule 12, Federal Rules of Criminal Procedure. Rule 12 governed the indictment challenge raised in Davis, but the rule by its terms has no applicability to the instruction errors here, which on direct appeal are governed by the Rule 52 "plain error" standard. Davis applied the Rule 12 "cause" requirement since Rule 12 applies to direct appeals and failure to enforce it on collateral attack would have established a standard of review actually lower than that on direct appeal. The Davis reasoning does not impose the "cause" requirement here since the direct appeal standard is "plain error."

Nonetheless, the government argues the Davis "cause" standard should be extended to cover this case. The government claims Francis v. Henderson, 425 U.S. 536 (1976) and Wainwright v. Sykes, 433 U.S. 72 (1977), which involved neither federal prisoners nor federal rules, support this result.

In Francis a state prisoner belatedly raised a habeas claim identical to that of the federal prisoner in Davis. The state had an absolute waiver provision, more strict than federal Rule 12's "cause" requirement, and a state court had held the claim for collateral relief barred by the strict state rule. This Court held the state rule required greater deference than the "deliberate by-pass" standard of Fay v. Noia, 372 U.S. 391 (1963). As a matter of federal comity, the Court adopted the "cause" standard. The Court expressly held a different result would obtain if the state court had declined to find a waiver and had reached the

merits of the claim. Francis, supra at 542 n.5. The "cause" standard was also applied in Wainwright v. Sykes, 433 U.S. 72 (1977), where again the state had an absolute waiver rule strictly enforced by state authorities.

Davis, Francis, and Sykes established that on collateral attack the standard of review must consider the federal or state rules applicable to direct appeals. Federal prisoners must meet the standards of federal rules, state prisoners must meet the standards of state rules, but if state procedural rules absolutely bar the claim, federal habeas relief may be granted upon demonstration of "cause" for not complying with the state rule.[2/]

Under the federal rules, "plain error" is the standard applicable to direct review of instructions not challenged at trial. Following Davis, the Court of Appeals applied this standard to Mr. Frady's collateral attack. This approach was also taken in Tallman v. United States, 465 F.2d 282 (7th Cir. 1972). The government cites no case applying the "cause" standard to a federal prisoner's habeas claim not governed by Rule 12. There is no division among the circuits on this question and the result reached by the Court of Appeals in this case is amply supported by Sunal, Kaufman, Tucker and Addonizio.

This result does not obliterate the distinction between direct appeal and collateral attack, as the government argues. Sunal established a major barrier to collateral claims not raised on direct appeal. The Sunal exceptions applicable here allow collateral relief for constitutional errors prejudicing jury deliberations on the fundamental question of guilt or innocence. It is precisely such errors which the great writ of habeas corpus was intended to correct.

2/ The significance of procedural rules in this context was also noted in Hankerson, supra at 244, n.8, where the Court held the states, "if they wish," may invoke state procedural rules to limit or bar consideration of habeas claims relying on Mullaney.

CONCLUSION

The petition for certiorari should be denied.

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